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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON,
Petitioners,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION,
Respondents.

On Appeal from the United States District Court for the Eastern District of Washington

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE ALL INDIAN PUEBLO COUNCIL, INC.
and
BRIEF OF THE ALL INDIAN PUEBLO COUNCIL, INC. AS AMICUS CURIAE

L. LAMAR PARRISH, ESQ.
USSERY, BURCIAGA, & PARRISH
P.O. Box 487
Albuquerque, N.M. 87103

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE ALL INDIAN PUEBLO COUNCIL, INC.

Comes now the All Indian Pueblo Council, Inc., pursuant to Supreme Court Rule 42, by and through its attorney alleges:

1. The All Indian Pueblo Council, Inc. is an organization consisting of the Nineteen Indian Pueblos located in New Mexico duly charted as a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to

act in concert for the advancement of goals common to the Indian Pueblos of New Mexico.

2. Consent has been obtained from the Respondents to file this motion and a brief amicus curiae in this cause. Consent has not been obtained from the Petitioners.

3. The basic questions of law herein are:

(1) Have the State of Washington's taxes levied upon on-reservation sales to non-Indians been preempted by federal policy as embodied in the Indian Reorganization Act, and the Indian Self-Determination Act?

(2) If the Tribal Governments Act to regulate or tax an entity found on Indian land, is the state preempted from regulation or taxation because such state action would amount to non-allowable interference with the tribe's right to self-government?

WHEREFORE, the All Indian Pueblo Council, Inc. respectfully moves the court for an order allowing it to file a brief amicus curiae on the merits in support of the Respondents.

L. LAMAR PARRISH, ESQ.
USSERY, BURCIAGA, & PARRISH
P.O. Box 487
Albuquerque, N.M. 87103
Attorneys for Amicus Curiae

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BRIEF OF THE ALL INDIAN PUEBLO COUNCIL, INC. AS AMICUS CURIAE

I.

INTEREST OF AMICUS CURIAE

The Ninteen Pueblo Tribes of New Mexico, either by resolution or policy have shown a particular interest in the development of their own taxing and licensing ordinances. A decision on a state's ability to

extend its taxing authority onto Indian lands would have a direct impact on the development of Pueblo taxing structures.

II

ARGUMENT

Point One

The State of Washington's Taxes Levied Upon On-Reservation Sales to Non-Indians Have Been Preempted by Federal Policy as Embodied in the Indian Reorganization Act, and the Indian Self-Determination Act.

There is presently a well established federal policy encouraging Indian self-government and economic development which has found expression in the Indian Reorganization Act of 1934, 48 Stat. 984, and the Indian Self-Determination Act of 1975, 88 Stat. 2203. The Preamble to the Indian Reorganization Act states that it is:

> An act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses and other organizations; to establish a credit system for Indians; *to grant certain rights of home rule to Indians;* to provide for vocational education for Indians; and for other purposes. (Emphasis added)

One of the rights of home rule is the ability to tax so as to allow for a self-governing structure. The federal government assures such rights under this specific Act. Eighteen of the nineteen Pueblo tribes of New Mexico come under the provisions of the Indian Re-

organization Act of 1934 and therefore have been acknowledged as retaining the aspect of home rule and the capability of taxing entities within their tribal borders.

The declaration of policy within the Indian Self-Determination Act states that:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people though the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of federal programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and adminstration of those programs and services.

The policy of the Indian Self-Determination Act is to insure greater control of tribal governments in the determination of the types of services that will be provided their communities. In light of such policy, it would frustrate the congressional intent for the federal or state governments to limit in any way the tribes' ability to extend their taxing authority over entities on the reservation in order to provide additional or supplemental services to present Bureau of Indian Affairs programs. And, for such a policy to work it must be contemplated that burdensome state interference in tribal taxing activities should not occur. The whole intent behind the on-going federal action over the last few years has been a recognition and support of tribal governments' attempts to act as truly self-governing entities. One of the strongest assurances that an entity can continue to be self-governing is its ability to tax. Once such a taxing ability

is removed or hindered, a governmental entity can no longer continue to be self-sustaining.

The nineteen Pueblo tribes of New Mexico are provided services through three different Bureau of Indian Affairs agencies. The Pueblo of Zuni has its own agency located on the reservation, while the remaining ten Pueblo tribes in the southern area of the state are serviced through the Southern Pueblos Agency. The eight Pueblo tribes in the northern part of the state are serviced through the Northern Pueblos Agency. The tribes must presently compete for services from the Bureau of Indian Affairs agencies which must in turn spread their services among several tribes, resulting in extreme diminution of services to the Pueblo communities by the federal government. In like manner the State of New Mexico has never conclusively shown any substantial amount of state taxes returned to Indian communities. Considering the number of businesses that are presently located within the reservation boundaries, as well as a rapidly increasing population within the State of New Mexico,[1] which will have a direct effect on the number of businesses and business activity extending onto the reservations, the ability of the tribes to tax enterprises and businesses found on Indian land is of extreme importance in providing services not now attainable through the limited resources of the Bureau of Indian Affairs. Any limitation of tribal governments' ability to tax or even a diminishing of the amount of revenues which the tribes might be able to gain by such taxes would be an extreme blow to the tribes' right of self-

[1] New Mexico population increased by approximately 200,000 from 1970-1978, and continues to increase at a higher rate. Bureau of Business and Economic Research, University of New Mexico.

government and to their very economic existence. One of the limited number of avenues left to Indian tribes for continued self-sustainment is the levying of taxes on business activities on Indian lands to the preemption of the state government, a right that should not be impaired.

Point Two

Where the Tribal Government Acts to Regulate or Tax an Entity Located on Indian Land, the State Is Preempted from Similar Regulation or Taxation Because Such State Action Would Amount to Tribal Governmental Interference.

Since the earliest of times the courts have recognized the sovereign nature of tribal governments, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515; 8 L.Ed. 483 (1832); *McClanahan* v. *Arizona*, 411 U.S. 164; 36 L.Ed. 2d 129; 93 S.Ct. 1257 (1973); and *Mescalero* v. *Jones*, 411 U.S. 145; 36 L.Ed. 2d 114; 93 S.Ct. 1267 (1973). In 1975, the New Mexico Commission on Indian Affairs in a report for the state entitled, "*Taxation and Indian Sovereignty*" found that:

> ". . . the tribe retains certain asects of sovereignty, subject to congressional action. One attribute of this inherent sovereignty is the power to tax." (At 25)

The study then went on to cite three major cases along this line, *Buster* v. *Wright*, 135 Fd. 947, 203 U.S. 599 (1906); *Morris* v. *Hitchcock*, 194 U.S. 384, (1904); and *Iron Crow* v. *Oglala Sioux Tribe*, 231 Fd. 2d 89 (1965). In the earliest case, *Buster* v. *Wright*, the United States Supreme Court held that:

> Authority of Creek Nation to prescribe the terms upon which non-citizens may transact business

> within its borders did not have its origin in an Act of Congress, treaty, or agreement of the United States, it was one of the inherent and essential attributes of its original sovereignty. (At 950)

This ruling came after action by the Creek Tribes to close non-Indian businesses for not paying a privilege tax which was imposed by the Creek Tribe.

In a report commissioned by the New Mexico Legislative Finance Committee in 1977, in a memorandum entitled, *Jurisdictional Relationships Between the State of New Mexico and Indian Tribes and Pueblos-Taxation*, the report states that:

> . . . it is generally recognized that an Indian tribe has the power to levy taxes on both Indian and non-Indian activities within the boundaries of its reservation. This power exists whether the tribe is operating as a sovereignty or under the Indian Reorganization Act . . . (At 17)

The report further states that:

> New Mexico cannot impose a tax on non-Indian activities within a reservation if the imposition of the tax results in interference with the tribe's rights of self-government or the rights of Indians among themselves. In making that determination all applicable federal laws, treaties and tribal constitutions and laws and state constitutions and laws must be considered. (At 13)

These statements by a State Legislative Committee, are characteristic of the long recognition of the tribe's ability to levy taxes within the confines of the reservation either on Indians or non-Indians.

But, as is stated in the same New Mexico Legislative Committee Finance Report, the question is not

whether the tribes can tax those found within their borders but whether they can tax to the exclusion of the state government because additional state taxes would amount to tribal governmental interference. Though the sovereign characteristics of tribes have been recognized over the years, one must also recognize movement on the part of the courts to limit the action of state governments in those areas where such action might pose an infringement on tribal sovereignty or an infringement on the abilities of the tribe's right to self-government. This governmental interference doctrine was first strongly espoused in the case of *Williams* v. *Lee*, 83 Ariz. 241, 319 P.2d 998, 358 U.S. 217, 3 L.Ed. 251, 79 S.Ct. 269 (1959) and *Kake* v. *Egan*, 369 U.S. 60, 7 L.Ed. 573, 82 S.Ct. 562 (1962) and recently in *Moe* v. *Confederated Tribes*, 425 U.S. 463, 48 L.Ed. 2d 96, 96 S.Ct. 1634 (1976). These cases have sought to define areas in which the state action might result in tribal governmental interference, and therefore state action could not be extended because it would be a hinderance on tribal self-government.

An evaluation of tribal governmental interference seems to be based on a case by case basis. Recently the New Mexico Courts tried to come to grips with this question in two major cases, *Shupe* v. *Bureau of Revenue*, 89 NM 265; 550 P.2d 277 (1976) and *Eastern Navajo Industries* v. *Bureau of Revenue*, 89 NM 369; 552 P.2d 805 (1976). In the *Shupe* case, an out-of-state contractor performing construction on an individual Pueblo was subjected to the state gross receipts tax by the State of New Mexico. The court found in favor of the State Bureau of Revenue, but only because there was not sufficient tribal action to preempt the state's action.

> The Nambe Indians are not paying the contractor: thus from all that appears from the record, the Nambe Indians will not sustain any direct financial burden as a result of this tax. The Nambe Indians have not themselves asserted tax jurisdiction over the taxpayers' activities, although the record reveals that discussions are being had about such a step. There is no indication from the record that the Pueblo will sustain any direct effects as the result of the tax and therefore no conflict with tribal sovereignty is shown. (At 280)

The opinion leads to the conclusion that sufficient tribal action in the form of licensing or taxation would have been sufficient to preempt such state action.[2]

In the case of *Eastern Navajo Industries* v. *Bureau of Revenue*, the State of New Mexico was attempting to tax a corporation that was incorporated under New Mexico law but was located on an Indian reservation and was 51% owned by tribal members. The court held that in this situation any attempt to levy a state tax would constitute illegal intereference with the tribal government:

> A case recently reviewed by the [New Mexico] Court of Appeals, *Shupe* v. *Bureau of Revenue*, 2183, State Bar Bulletin, Vol. 15, No. 7, April 22, 1976, is readily distinguished from the present case. The taxpayer in *Shupe* is a Washington corporation qualified to do business in New Mexico. It is constructing a dam on the Nambe Pueblo under contract with the U.S. Department of Interior, Bureau of Reclamation. Taxpayer presented the issue that the gross receipts tax was

[2] The Pueblo of Nambe passed a resolution establishing their intent to tax after the suit had already commenced.

> illegally imposed because taxpayers activities were on Indian land. This Court held that the tax was correctly accessed to this corporation for two reasons: (1) Taxpayer Corporation was not an Indian entity, and (2) *The imposition of the tax does not infringe on Indians rights of self-government*. (Emphasis added)
>
> Our holding in the present case is the converse: Eastern Navajo Industries is an Indian entity, according to the federal definition, so that imposition of the gross receipts tax on this taxpayer constitutes an interference of Indian self-government. (At 810)

There are approximately 47 Indian owned businesses located in and throughout the nineteen Pueblos in the State of New Mexico.[3] There are approximately 153 non-Indian owned businesses proposed or presently located on Pueblo lands within New Mexico.[4] Twelve of the nineteen tribes have passed resolutions stating their intent to tax,[5] and two tribes presently have taxing ordinances which have been instituted.[6] The Pueblo tribes have entered the sphere of taxation, exercising their inherent taxing authority to the preemption of the state.

[3] *Directory of Indian Owned Businesses*, 1978, All Indian Development Association.

[4] Bureau of Indian Affairs Realty Offices for the Southern Pueblos Agency and the Northern Pueblos Agency, New Mexico.

[5] Appendix-Resolution is similar to those passed by Pueblo Tribes.

[6] The Pueblos of Zuni and Isleta have passed tax ordiances.

III

CONCLUSION

The amicus curiae respectfully submit that this court order the decision below be upheld and the decision of the trial court be allowed to stand.

Respectfully submitted,

L. LAMAR PARRISH, ESQ.
USSERY, BURCIAGA, & PARRISH
P.O. Box 487
Albuquerque, N.M. 87103
Attorneys for Amicus Curiae

APPENDIX

Pueblo of Jemez

OFFICE OF THE GOVERNOR

P.O. BOX 78

JEMEZ PUEBLO, NEW MEXICO 87024

RESOLUTION

At a duly called meeting of the Tribal Council of the Pueblo of Jemez, the following resolution was passed:

WHEREAS, the Tribal Council of the Pueblo of Jemez is fully aware that the history of the Pueblo is since time immemorial, that it is an independent sovereign government, and that it has total authority in regulating all activity on tribal lands, and

WHEREAS, the social and economic well-being of the people of the Pueblo of Jemez is of special significance and concern to the Council of the Pueblo of Jemez, and

WHEREAS, all New Mexico Pueblos were recognized and constituted as bodies politic and public corporations and recognized in the nature of municipalities under the New Mexico Territorial Government until the granting of statehood to New Mexico, and

WHEREAS, the term "Indian" and "Indian country" include the Pueblo Indians of New Mexico and the lands now owned or occupied by them, which land and occupation were specifically disclaimed with regard to jurisdiction under the New Mexico Enabling Act, and

WHEREAS, the Federal control over Pueblos is and has been recognized by the United States Gov-

ernment, affirmed in case law, which has held that the Pueblos of New Mexico are Indian Tribes entitled to the same rights of self-government under the Constitution and laws of the United States, and

WHEREAS, taxation of activities and enterprises on Jemez Pueblo land is an inherent right of a sovereign, self-governing people, and

WHEREAS, the power of tribal governments to levy taxes has been upheld by the Supreme Court of the United States, and

WHEREAS, the taxing of revenues obtained from the legitimate exercise of the taxing powers of the Pueblo of Jemez can be used to benefit the people of Jemez Pueblo socially and economically.

NOW, THEREFORE, BE IT RESOLVED that the Pueblo of Jemez has taxed enterprises and activities on its lands, and that it intends to continue to do so, by reason of its own political heritage and the applicable laws of the United States.

BE IT FURTHER RESOLVED that the Pueblo of Jemez intends to supplement its existing law providing for taxation with a comprehensive set of tax ordinances which, in the wisdom of the people of Jemez Pueblo, will best serve the needs of the Pueblo of Jemez, and continue to preserve the Pueblo's right as a self-governing people.

BE IT FURTHER RESOLVED that by passing this resolution, it is the specific intent of the Council of the Pueblo of Jemez to indicate to all other government instrumentalities of whatever nature that it intends to exercise civil and exclusive rights unto itself to impose taxes on persons, activities, and enterprises

within its boundaries and that any such attempts by any other such governmental instrumentality whatsoever shall be considered void and shall constitute an illegal intrusion upon the inherent powers of self-government of the Pueblo of Jemez.

Certification

I, the undersigned, as Governor of the Pueblo of Jemez, do hereby certify that the foregoing Resolution was passed at a duly called meeting of the Council of the Pueblo of Jemez held on the 18 day of July, 1978, at which a quorum was present, with 9 voting for and 0 opposing said resolution.

/s/ LOUIS CASIQUITO
Louis Casiquito
Governor, Pueblo of Jemez

ATTEST:

/s/ LT. GOV. FRANK F. FRAQUA
Lt. Gov. Frank F. Fraqua
Secretary

/s/ JOE L. LORETTO
Joe L. Loretto
Member of Tribal Council

/s/ PAT TORA
Pat Tora
Member of Tribal Council

/s/ MANUEL SANDIA
Manuel Sandia
Member of Tribal Council

/s/ JOE A. SANDO
Joe A. Sando
Member of Tribal Council

/s/ HENRY MORA
Henry Mora
Member of Tribal Council

/s/ AUGUSTINE SANDO
Augustine Sando
Member of Tribal Council